491 F.3d 293

APPENDIX A

United States Court of Appeals,Fifth Circuit.
Walter Allen ROTHGERY, Plaintiff-Appellant,
v.
GILLESPIE COUNTY, TEXAS,
Defendant-Appellee.
No. 06-50267.

June 29, 2007.

William Gerow Christian (argued), Graves, Dougherty, Hearon & Moody, Andrea M. Marsh, Harry Williams, IV, Texas Fair Defense Project, Austin, TX, for Rothgery.

Charles Straith Frigerio (argued), Hector X. Saenz, Law Offices of Charles S. Frigerio, San Antonio, TX, for Defendant-Appellee.

Susanna Dokupil, R. Ted Cruz, Austin, TX, for Amicus Curiae, State of TX.

George E. Dix, University of Texas School of Law, Austin, TX, for Amicus Curiae University of Texas School of Law.

Appeal from the United States District Court for the Western District of Texas.

Before KING, WIENER, and OWEN, Circuit Judges.

KING, Circuit Judge:

In *McGee v. Estelle,* we held that a warrantless arrestee's Sixth and Fourteenth Amendment right to

counsel does not attach in Texas when he appears before a magistrate for statutory warnings if prosecutors are unaware of and uninvolved in the arrest and appearance. 625 F.2d 1206, 1208-09 (5th Cir.1980). The district court in this case reached a similar conclusion where the warrantless arrestee's appearance involved not only statutory warnings, but also a probable cause determination by the magistrate that was supported by a police officer's affidavit accusing the arrestee of committing the relevant offense. Because we agree that the appearance in this case did not commence adversary judicial proceedings for purposes of the Sixth and Fourteenth Amendment right to counsel, we AFFIRM the district court's order granting summary judgment for Gillespie County.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 15, 2002, officers of the Fredericksburg, Texas Police Department arrested plaintiff-appellant Walter Rothgery without a warrant on suspicion of being a felon in possession of a firearm, which is a third-degree felony in Texas. The suspicion was based on a criminal background check indicating that Rothgery had been convicted of a felony in California. In fact, felony charges against Rothgery in California had been dismissed after Rothgery completed a diversionary program, and both sides agree that Rothgery did not have a felony conviction.

Under the misimpression that Rothgery had a prior felony conviction, the officers booked Rothgery

into the Gillespie County Jail. Rothgery says that he requested in writing the appointment of counsel at this point, though there is no record of the request. The next morning, on July 16, Rothgery was brought before a Justice of the Peace (the "magistrate") to be informed of the accusation against him and to be given statutory warnings under Article 15.17 of the Texas Code of Criminal Procedure, which provides for warnings generally equivalent to those required by *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[1] Rothgery signed a document reflecting that the magistrate did so and that Rothgery stood "accused of the criminal offense of[ ] unlawful possession of a firearm by a felon which will be filed in 21st District Court." On the document, the magistrate swore that "[t]he accused has announced

[1] Article 14.06 of the Texas Code of Criminal Procedure requires that a person arrested without a warrant be taken before a magistrate within 48 hours of arrest, at which point the magistrate must "immediately perform the duties described in Article 15.17." TEX.CODE CRIM. PROC. ANN. art. 14.06. Article 15.17, which also applies to those who are arrested under warrant, requires that the magistrate inform the arrestee of the accusation against him, of any affidavit filed against him, and of his rights to retain counsel, to have counsel appointed for him if he cannot afford counsel, to remain silent, to have an attorney present during interviews with officers of the state, to terminate interviews at any time, and to have an examining trial to probe the existence of probable cause. *Id.*art. 15.17. The magistrate may also "admit the person arrested to bail if allowed by law." *Id.*

the intention to *waive right to counsel at this time.*"[2] The magistrate set bond at $5,000.

The arresting officer also presented the court with an affidavit titled "Affidavit of Probable Cause." The form document was filled in with the officer's description of the events leading up to the arrest and recited, "I charge that heretofore, on or about the 15[th] day of July, 2002, in the County of Gillespie and the State of Texas, Defendant, Walter A. Rothgery, did then and there commit the offense of unlawful possession of a firearm by a felon-3rd degree felony." Based on the affidavit, the magistrate found that probable cause existed for Rothgery's arrest, signing the document under a portion of text stating, "I hereby acknowledge I have examined the foregoing affidavit and have determined that probable cause existed for the arrest of the individual accused therein." After the appearance, Rothgery posted a surety bond to obtain release from jail. The bond agreement between Rothgery and the bonding company states, among other details of Rothgery's arrest, that "Rothgery stands charged by complaint duly filed in the Justice of Peace Court."

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[2] According to Rothgery, the magistrate told him that he would have to waive his right to an attorney for purposes of the appearance if he wanted to have bail set at that time, and that otherwise he would have to wait in jail until an appointment was made. On the original typed document, only the words "waive right to counsel" were underlined, and Rothgery says that the words "at this time" were also underlined by hand to reflect this limited waiver.

Rothgery says that he repeatedly requested counsel in the months following his release, but no counsel was appointed. On January 17, 2003, six months after his arrest, a grand jury returned an indictment against Rothgery and he was rearrested the next day. Rothgery was brought before the magistrate again on January 19 and he again requested counsel, but no attorney was appointed. On January 23, still with no attorney, Rothgery was transferred to another jail due to overcrowding at the Gillespie County Jail. Finally, after Rothgery requested counsel yet again, a state district judge appointed counsel on January 23, 2003. Once appointed, Rothgery's counsel soon obtained records establishing that Rothgery had not been convicted of a felony. He moved to dismiss the charges, and the motion was granted on April 30, 2003.

On July 15, 2004, Rothgery sued defendant-appellee Gillespie County under 42 U.S.C. § 1983, alleging that the county violated his Sixth and Fourteenth Amendment right to counsel by following a policy of denying appointed counsel to arrestees released from jail on bond and by failing to adequately train and monitor those involved in the appointment-of-counsel process. Rothgery's contention is that counsel should have been appointed for him after his first appearance in the magistrate's court on July 16, 2002, and that the mistake underlying his arrest would have been discovered had counsel been timely appointed. Gillespie County moved for summary judgment on the ground that Rothgery's

Sixth and Fourteenth Amendment right to counsel did not attach until his indictment on January 17, 2003, which marked the initiation of adversary judicial proceedings against him. The district court granted the motion on February 2, 2006, and issued a take-nothing final judgment. Rothgery appeals.[3]

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo, viewing all evidence in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. *See Crawford v. Formosa Plastics Corp.*, 234 F.3d 899, 902 (5th Cir.2000). "Summary judgment is proper when the evidence reflects no genuine issues of material fact and the non-movant is entitled to judgment as a matter of law." *Id.* (citing FED.R.CIV.P. 56(c)). "A genuine issue of material fact exists 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

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[3] We are indebted to the Solicitor General of Texas, Ted Cruz, who filed an amicus curiae brief in this appeal at our request, and to Professor George Dix of The University of Texas School of Law, who also filed an amicus curiae brief.

III. DISCUSSION

The Sixth Amendment, which is applicable to the states through the Fourteenth Amendment,[4] provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This right "attaches only at or after the time that adversary judicial proceedings have been initiated . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[5] *Kirby v. Illinois,* 406 U.S. 682, 688-89, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (citations and footnote omitted). But we do not rely formalistically on the label given to a particular pretrial event when determining the point at which adversary judicial proceedings have been initiated; instead, "the relevant time is when 'the government has committed itself to prosecute' and 'a defendant finds himself faced with the prosecutorial forces of organized

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[4] *Gideon v. Wainwright,* 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). For clarity, we will refer only to the Sixth Amendment when discussing the right to counsel.

[5] After the Sixth Amendment right to counsel attaches, a defendant is entitled to counsel at "critical stages" of the proceedings, absent a valid waiver. *See Michigan v. Jackson,* 475 U.S. 625, 629-30 & n. 3, 632 n. 5, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

Gillespie County does not argue that the time between Rothgery's release on bond and his indictment six months later did not constitute a critical stage of the prosecution, and we do not decide that issue here.

society.'"[6] *Caver v. Alabama,* 577 F.2d 1188, 1195 (5th Cir.1978) (quoting *Kirby,* 406 U.S. at 689, 92 S.Ct. 1877); *see also Lomax v. Alabama,* 629 F.2d 413, 415 & n. 3 (5th Cir.1980) (rejecting the use of "purely formal application of quantitative criteria" to determine when adversary judicial proceedings commenced).

Following this approach in *Lomax v. Alabama,* we instructed that "reliance should be placed on the sometimes elusive degree to which the prosecutorial forces of the state have focused on an individual." 629 F.2d at 415. Accordingly, we held that an arrest, under a warrant secured with a magistrate's probable cause determination, did not commence adversary judicial proceedings because the record did not reflect any prosecutorial awareness of or involvement in the arrest, nor any participation by prosecutors in preparing the "complaint affidavits used to secure" the warrant. *Id.* at 415-16. Similarly, we held in *McGee v. Estelle* that in Texas, "an adversary criminal proceeding has not begun in a case where the prosecution officers are unaware of either the charges or the arrest." 625 F.2d 1206, 1208 (5th Cir.1980). We thus concluded that a warrantless arrestee's lineup and

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[6] "We look to state law to determine when adversarial proceedings against the accused have commenced," *Felder v. McCotter,* 765 F.2d 1245, 1247 (5th Cir.1985), *abrogated on other grounds by Patterson v. Illinois,* 487 U.S. 285, 295-96 & n. 8, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), although the ultimate Sixth Amendment consequences of certain state procedures is a matter of federal law.

appearance before a magistrate for Article 15.17 warnings did not initiate adversary judicial proceedings, as prosecutors were unaware of and uninvolved in either event.[7] *Id.* at 1208-09.

It is undisputed in this appeal that the relevant prosecutors were not aware of or involved in Rothgery's arrest or appearance before the magistrate on July 16, 2002. There is also no indication that the officer who filed the probable cause affidavit at Rothgery's appearance had any power to commit the state to prosecute without the knowledge or involvement of a prosecutor. *Compare* TEX.CODE CRIM. PROC. ANN. art. 2.13 (limiting the role of a police officer, in relevant part, to notifying the magistrate of an offense and arresting offenders), *with id.* art. 2.01-.02 (designating district and county attorneys as the representatives of the state in all criminal cases and

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[7] While the opinion did observe at one point that an Article 15.17 warnings appearance before a magistrate "does not involve counsel for the state, *nor* is it a formal charge," *McGee*, 625 F.2d at 1209 (emphasis added), we do not read that to imply that formal charges may exist in Texas without any prosecutorial knowledge or involvement. In context, the statement merely clarified that prosecutors do not participate in such an appearance, nor are formal charges filed. We have not held that prosecutors must actually file the document that initiates adversary judicial proceedings, *see, e.g., Felder*, 765 F.2d at 1246, 1247-48 (noting that a police officer's filing of an affidavit and criminal complaint commenced adversary judicial proceedings), but merely that adversary judicial proceedings cannot initiate without some prosecutorial awareness or involvement, *McGee*, 625 F.2d at 1208; *see also Lomax*, 629 F.2d at 415.

proceedings); *cf. Clawson v. Wharton County,* 941 S.W.2d 267, 272 (Tex.App.-Corpus Christi 1996, writ denied) (recognizing that "the decision not to prosecute is the quintessential function of a prosecutor" (dash omitted)). And Rothgery provides no reason why the officer's acts should somehow be imputed to the prosecutor's office or should otherwise be interpreted to signal that Rothgery was opposed by the prosecutorial forces of the state. Consequently, the summary judgment evidence fails to establish that adversary judicial proceedings had been initiated against Rothgery during his magistrate appearance.

Rothgery raises several arguments against this conclusion. First, he contends that *McGee*'s holding on prosecutorial involvement is not good law, as the Supreme Court has twice found adversary judicial proceedings to have been initiated without mentioning whether prosecutors were involved. *See Michigan v. Jackson,* 475 U.S. 625, 629 n. 3, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986); *Brewer v. Williams,* 430 U.S. 387, 399, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977). However, neither case addressed the issue of prosecutorial involvement, much less the relevance of prosecutorial involvement under Texas law. Further, both cases involved a defendant who was arraigned on an arrest warrant, and an arraignment is one of the specific examples given in *Kirby* of pretrial events that initiate adversary judicial proceedings. Although Rothgery argues that the arraignment in *Jackson* was functionally no different than his appearance here, the state supreme court opinion preceding *Jackson*

establishes that the prosecutor's office approved and issued the complaints and warrants that led to the arraignment. *See People v. Bladel,* 421 Mich. 39, 365 N.W.2d 56, 71-72 (1984). And while the extent of prosecutorial involvement in *Brewer* was unaddressed, it does not appear that the state contested that adversary judicial proceedings had begun or otherwise raised the issue. *See Brewer,* 430 U.S. at 399, 97 S.Ct. 1232 ("The State does not contend otherwise."). At most, the opinions are neutral on the point, which is simply not enough for us to ignore our binding authority.[8]

Rothgery also argues that *McGee* is inapplicable here, as the appearance before the magistrate in *McGee* only involved the recitation of statutory warnings, whereas Rothgery's appearance included statutory warnings and a probable cause determination that was based on a police officer's affidavit. Rothgery

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[8] According to Rothgery, *United States v. Gouveia* also affirmed that prosecutorial involvement is unnecessary because it used the word "or" when observing that it had "extended an accused's right to counsel to certain 'critical' pretrial proceedings . . . recognizing that at those proceedings, 'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984) (citing *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and quoting *United States v. Ash,* 413 U.S. 300, 310, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973)) (citations omitted). But in that passage the Court was discussing the applicability of the right to counsel at critical stages of the prosecution, not the specific question of when adversary judicial proceedings are initiated.

contends that the affidavit, which related the events underlying the arrest and stated that the officer "charge[d]" that Rothgery committed the offense of being a felon in possession of a firearm, constituted a "complaint" or an otherwise formal charge that initiated adversarial proceedings.[9]

While only an indictment or information can formally charge a felony under Texas law,[10] *see Teal v. State,* No. PD-0689-06, 2007 WL 676221, at *2 (Tex.Crim.App. Mar. 7, 2007); *see also* TEX. CONST. art. I, § 10; TEX.CODE CRIM. PROC. ANN. arts. 21.01, 21.20; GEORGE E. DIX & ROBERT O. DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 20.01, at 513 (2d ed.2001), complaints play a role in felony cases as well. Defined as "[t]he affidavit made before the magistrate or district or county attorney ... charg[ing] the commission of an

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[9] Additionally, Rothgery asserts that his appearance before the magistrate commenced the prosecution because a magistrate has exclusive jurisdiction over a defendant's case upon the filing of a felony complaint until superseded by indictment. *See Ex parte Clear,* 573 S.W.2d 224, 229 (Tex.Crim.App.1978). Even assuming that the affidavit in this case served the same function as the complaint in *Clear,* we fail to see how a magistrate's jurisdiction over preliminary matters alone signals the initiation of adversary proceedings when prosecutors are unaware of and uninvolved in the proceedings. Indeed, *Clear* itself involved a complaint that was sworn before a prosecutor and filed by the prosecutor with the magistrate. *Id.* at 225-26.

[10] Complaints may serve to formally charge a misdemeanor offense in justice and municipal courts. *Huynh v. State,* 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995).

offense," TEX.CODE CRIM. PROC. ANN. art. 15.04, a complaint under Article 15.04 of the Texas Code of Criminal Procedure may serve both as a basis for a probable cause finding for an arrest warrant, *see Huynh v. State,* 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995); *Lowery v. State,* 499 S.W.2d 160, 163 (Tex.Crim.App.1973), and "as a basis for the issuance of an information or the commencement of the indictment process," *State v. Boseman,* 830 S.W.2d 588, 590 n. 3 (Tex.Crim.App.1992); *see also* DIX & DAWSON, 41 TEXAS PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 19.01, at 473 ("As a matter of local practice, . . . complaints may be routinely filed in felony prosecutions and may reflect prosecutors' decisions to pursue formal felony charges in the particular cases."). Because "the process of prosecution is usually initiated by the filing of a criminal 'complaint'" serving that latter function, *Boseman,* 830 S.W.2d at 590 n. 3, our court and the Texas Court of Criminal Appeals[11] have construed felony complaints to be sufficient to initiate adversary judicial proceedings.[12] *See, e.g., Felder v. McCotter,*

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[11] While state case law is not binding on our court with regard to the applicability of the Sixth Amendment to state procedures, state cases are nonetheless useful for determining the nature of certain state procedures.

[12] Despite Rothgery's claim that *Nehman v. State,* 721 S.W.2d 319, 322 (Tex.Crim.App.1986) (en banc), holds that the combination of a probable cause determination and an Article 15.17 warnings appearance initiates adversary judicial proceedings, the Texas Court of Criminal Appeals later observed that *Nehman*'s holding was based on the presence of "unspecified

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765 F.2d 1245, 1247-48 (5th Cir.1985), *abrogated on other grounds by Patterson v. Illinois,* 487 U.S. 285, 295-96 & n. 8, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988); *Forte v. State,* 707 S.W.2d 89, 92 (Tex.Crim.App.1986); *Barnhill v. State,* 657 S.W.2d 131, 132 (Tex.Crim.App.1983).

However, none of those cases details the circumstances involved in the filing of the dispositive complaint or addresses an affidavit that was filed after a warrantless arrest to support a magistrate's probable cause inquiry at an Article 15.17 warnings appearance. In fact, in similar circumstances involving a warrantless arrest, a felony complaint, and a magistrate's probable cause determination at an Article 15.17 warnings appearance, the Texas Court of Criminal Appeals chose not to decide whether the complaint initiated adversary judicial proceedings, which indicates that the relationship between a complaint and the commencement of a prosecution in Texas is less clear than Rothgery claims.[13] *See Green*

'charges.' " *Green v. State,* 872 S.W.2d 717, 720 (Tex.Crim.App.1994); *Nehman,* 721 S.W.2d at 323 n. 2. At the very least, we must assume that *Nehman* involved a felony complaint.

[13] *Green v. State* involved a Sixth Amendment claim in the context of an arrest without a warrant, the filing of a "felony complaint" with a notation indicating the setting of bail, and an appearance before a magistrate for Article 15.17 warnings and a probable cause determination. 872 S.W.2d at 718. After discussing the indeterminacy of Texas law on the question of which procedures serve to initiate adversary judicial proceedings and noting the cases that have held that the filing of a complaint serves that function, the court stated: "We need not here decide

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v. State, 872 S.W.2d 717, 720 (Tex.Crim.App.1994). As complaints may be used for different purposes, we simply cannot assume that the affidavit filed in this case was the same type of complaint addressed in the cases cited by Rothgery or that it served the same function as those complaints.

Consequently, we are reluctant to rely on the formalistic question of whether the affidavit here would be considered a "complaint" or its functional equivalent under Texas case law and Article 15.04 of the Texas Code of Criminal Procedures – a question to which the answer is itself uncertain.[14] Instead, we must look to the specific circumstances of this case and the nature of the affidavit filed at Rothgery's

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when adversary judicial proceedings commence. For even if the felony complaint was sufficient to mark the initiation of adversary judicial proceedings, . . . nothing occurred at appellant's [hearing] that would render it a 'critical stage' of the prosecution against him." *Id.* at 720.

[14] As Gillespie County points out, Article 15.04 falls within the "Arrest Under Warrant" chapter of the Texas Code of Criminal Procedure, indicating that it may only apply to affidavits offered in support of an arrest warrant. Additionally, the provision refers to "[*t*]*he* affidavit" made before the magistrate or prosecutor, TEX.CODE CRIM. PROC. ANN. art. 15.04 (emphasis added), and its use of the definite article "the" indicates that its scope may be limited to affidavits detailed elsewhere in the code. The code does not explicitly provide for an affidavit offered at a probable cause hearing for a warrantless arrestee.

In practice, however, we cannot say that Texas courts would not consider a post-warrantless-arrest affidavit of probable cause to be an Article 15.04 complaint or its functional equivalent.

appearance before the magistrate. And the summary judgment evidence, considered in the light most favorable to Rothgery, fails to establish that adversary judicial proceedings were commenced by the affidavit in this case.

The affidavit itself indicates that it was filed for the sole purpose of establishing probable cause, as it was titled "Affidavit of Probable Cause," it primarily consisted of the officer's account of the events and the alleged offense, and the portion of the affidavit signed by the magistrate illustrates that the magistrate relied on the officer's account to "determine[] that probable cause existed for the arrest." The inquiry and its timing shortly after arrest were thus consistent with the probable cause determination required by *Gerstein v. Pugh,* 420 U.S. 103, 114, 95 S.Ct. 354, 43 L.Ed.2d 54 (1975),[15] and *County of Riverside v. McLaughlin,* 500 U.S. 44, 56, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), for a person arrested without a warrant. And another form signed by the magistrate to memorialize the warnings given to Rothgery indicated that charges "will be filed" in the district court, not that they were being filed concurrently with the magistrate.

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[15] The Court in *Gerstein* also recognized that such probable cause determinations typically are non-adversarial in nature and do not constitute "critical stages" requiring counsel. 420 U.S. at 120-22, 95 S.Ct. 854.

The only aspect of the probable cause affidavit that even arguably favors Rothgery's argument is its use of the word "charge" in the introductory language to the officer's identification of the offense for which he arrested Rothgery. Yet even as a complaint, the affidavit would be insufficient to formally charge Rothgery with the felony, and there is no basis to conclude that the use of the word "charge" was, or could have been, anything but informal.[16] *Cf. McGee*, 625 F.2d at 1208 (referring to the prosecutor's lack of awareness of "the charges" in finding that adversary judicial proceedings had not initiated).

Most significantly, the summary judgment evidence reflects no prosecutorial knowledge of or involvement in the arrest and magistrate appearance, and Rothgery provides no reason to believe that the officer alone was empowered to commit the state to prosecute Rothgery. Indeed, it took prosecutors roughly six months after the arrest to seek an indictment against Rothgery. Without any evidence to indicate that the affidavit actually served to initiate the prosecution at the time of Rothgery's magistrate appearance, we conclude that the filing of the affidavit was part of the investigatory process, serving solely to validate the arrest without committing the state to prosecute.

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[16] For similar reasons, we also do not find the use of the word "charged" on Rothgery's bond form persuasive.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's order granting summary judgment to Gillespie County.

APPENDIX B

413 F.Supp.2d 806

United States District,W.D. Texas, Austin Division.
Walter Allen ROTHGERY, Plaintiff,
v.
GILLESPIE COUNTY, TEXAS, Defendant.
No. A-04-CA-456LY.

Feb. 2, 2006.

William Christian, Graves, Dougherty, Hearon & Moody, Andrea M. Marsh, Director, Texas Fair Defense Project, Austin, TX, for Walter Allen Rothgery, Plaintiff.

Charles Straith Frigerio, Attorney at Law, San Antonio, Hector Xavier Saenz, Law Ofcs. Of Chas. S Frigerio, for Gillespie County, TX, Defendant.

YEAKEL, District Judge.

Before the Court are Defendant Gillespie County's Motion for Summary Judgment filed July 18, 2005 (Doc. # 28); Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment filed August 8, 2005 (Doc. # 32); Plaintiff's Appendix of Summary Judgement Evidence filed August 8, 2005 (Doc. # 33); and Defendant Gillespie County's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment filed August 19, 2005 (Doc. # 29). The Court heard argument on the motion on November 18, 2005. Having considered the motion, response, and reply, as well as argument of counsel,

summary-judgment proof presented, and applicable case law, the Court will grant the summary-judgment motion for the following reasons.

I. Background

On July 15, 2002, officers of the Fredericksburg, Texas Police Department arrested Plaintiff Walter Allen Rothgery without a warrant for unlawfully carrying a firearm by a felon, a third-degree felony under Texas law.[1] Rothgery was taken to the Gillespie County jail for booking. Rothgery states he requested, in writing, appointment of counsel, because he could not afford to hire an attorney to defend him. This written request is not a part of the summary-judgment proof submitted to this Court.

The next morning, July 16, 2002, Rothgery appeared before Judge Carl Schoessow, Justice of the Peace, Precinct # 2, Gillespie County.[2] At that time,

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[1] At the summary-judgment stage, this Court is required to believe the evidence of the nonmovant and to draw all justifiable inferences in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court's factual recitation, therefore, reflects Rothgery's version of the facts.

[2] Because Rothgery was arrested without a warrant, Texas law requires that he be presented to a magistrate within forty-eight hours of his arrest. *See* TEX CODE CRIM. PROC. ANN. art. 14.06(a) (West Supp.2005). Presentation to the magistrate is required, in part, so that the magistrate can inform a person arrested of the accusation against him and of any affidavit filed therewith, of his right to retain counsel, of his right to remain

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Judge Schoessow presented Rothgery with a form "Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie," which Rothgery submitted as part of his summary-judgment proof. The form reflects that Judge Schoessow informed Rothgery that Rothgery was accused of the criminal offense of unlawful possession of a firearm by a felon, but that formal charges had not yet been filed against Rothgery, and that Judge Schoessow set Rothgery's bond at $5,000. Additionally, the form reflects that Judge Schoessow informed Rothgery of his right to appointed counsel, if Rothgery could not afford counsel, and that Rothgery waived his right to counsel "at that time."[3]

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silent, of his right to have an attorney present during any interview with peace officers or attorneys representing the state, of his right to terminate the interview at any time, of his right to have an examining trial, and of his right to request the appointment of counsel if the person cannot afford counsel. *See* TEX CODE CRIM. PROC. ANN. art. 15.17(a) (West Supp.2005). The magistrate is further required to inform the person arrested of the procedures for requesting appointment of counsel and that he is not required to make a statement and that any statement made by him may be used against him. *See id.* These sections of the Texas Code of Criminal Procedure were amended after Rothgery's arrest. Because the amendments did not materially alter the sections as they existed then, the current versions are cited for simplicity.

[3] The phrase "at that time" is underlined on the form. Rothgery testified in his deposition that this phrase was underlined because, when Rothgery asked Judge Schoessow about the status of his July 15, 2002 request for appointment of counsel. Judge Schoessow said that Rothgery would have to waive his right to an attorney for purposes of the July 16, 2002

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As part of his summary-judgment proof, Rothgery also submitted the Affidavit of Probable Cause sworn to by the arresting officer on July 15, 2002. This affidavit purports to set forth facts personally observed by the arresting officer regarding Rothgery's actions on July 15, 2002, and charges that Rothgery committed the offense of unlawful possession of a firearm by a felon, a third degree felony. *See* TEX. PENAL CODE ANN. § 46.04 (West Supp.2005).[4] The affidavit further reflects that on July 16, 2002, Judge Schoessow examined the affidavit and determined that probable cause existed for the arrest of Rothgery.

After Rothgery posted bail, he continued to inquire about the status of his July 15, 2002 request for appointment of counsel. After county employees informed him that they could not locate his July 15, 2002 request for counsel, Rothgery completed a second written request for appointment of counsel on July 24, 2002. Rothgery caused the request to be notarized and submitted to jail employees. No

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appearance, if Rothgery wanted to have bail set at that time. According to Rothgery, Judge Schoessow told him that he would have to wait in jail until an appointment was made, if Rothgery wanted an attorney appointed for the bail determination. Rothgery further testified that he agreed to waive his right to counsel for purposes of that proceeding only based upon Judge Schoessow's statements, and that Judge Schoessow underlined the phrase "at that time" to reflect this limited waiver.

[4] This section of the Texas Penal Code was amended after Rothgery's arrest. Because the amendment did not materially alter the section as it existed then, the current version is cited for simplicity.

attorney was appointed for him based on the July 24, 2002 request.

As is true of the July 15, 2002 request, this second request is not a part of the summary-judgment proof before this Court. Rothgery's summary-judgment proof does include the notary log of Barbara Crenwegle, the administrative assistant to the Gillespie County Judge and Commissioners. Crenwegle's notary log reflects that Crenwegle notarized a request for appointment of an attorney and an affidavit in support of an application for appointment of an attorney on July 24, 2002, for "Walter A. Rothgery."

From July 2002 until January 2003, Rothgery claims that he repeatedly contacted employees of Gillespie County to inquire about the status of his appointment of counsel. Rothgery testified in his deposition that he was consistently told that no appointment had been made.

On January 17, 2003, six months after Rothgery's arrest, a Gillespie County grand jury returned an indictment against Rothgery for the state felony offense of unlawfully carrying a firearm by a felon. Rothgery's bond was increased to $15,000, and he was rearrested on January 18, 2003. Rothgery was again brought before Judge Schoessow on January 19, 2003.[5] When he appeared before Judge Schoessow,

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[5] Rothgery testified in his deposition that he thought he appeared before Judge Schoessow on January 19, 2003, but that

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Rothgery inquired about the status of his last request for appointment of counsel, the July 24, 2002 written request. Rothgery states that Judge Schoessow speculated that Rothgery had not been appointed an attorney because he "didn't deserve one." Rothgery further testified in his deposition that, as of January 19, 2003, there was no record of his submitting the previous two requests for appointment of counsel. Rothgery claims that he submitted a third form requesting counsel on January 19, 2003. Like the others, this request is not in the summary-judgment record before this Court.

Three days later, and still with no appointed attorney, Rothgery was transferred to the Comanche County jail due to overcrowding in the Gillespie County jail. Rothgery asked Comanche County jail employees about the status of his request for appointment of counsel, and was told that they knew nothing of such request. On January 23, 2003, Rothgery completed a fourth written request, and employees at the Comanche County jail faxed the request to Gillespie County. Based on this request, State District Judge Stephen Ables immediately appointed counsel to represent Rothgery. The January 23, 2003

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he was unsure. As part of its summary-judgment proof, Gillespie County submitted the second "Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie" form issued to Rothgery, and this form reflects that Rothgery appeared before Judge Schoessow on January 19, 2003.

request is part of the summary-judgment record in this case.

Rothgery's appointed counsel expeditiously obtained records concerning the alleged underlying offense, which reflected that Rothgery was not a convicted felon. On that basis, the Gillespie County District Attorney moved to dismiss the indictment. Judge Ables granted the motion and dismissed the indictment against Rothgery on April 30, 2003.

On July 15, 2004, Rothgery filed this action under Title 42, United States Code, Section 1983, the federal Civil Rights Act, against Gillespie County. *See*42 U.S.C. § 1983. Rothgery alleges that Gillespie County's policies or customs regarding appointment of counsel for indigent defendants violate the Sixth and Fourteenth Amendments to the United States Constitution. Rothgery does not, however, complain about Gillespie County's written policies and procedures concerning appointment of counsel for indigent defendants. Rather, Rothgery complains about unwritten policies and customs concerning appointment of counsel for indigent defendants that he alleges both the county and state courts follow in Gillespie County.[6]

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[6] As part of his summary-judgment proof, Rothgery submitted Gillespie County's written policies, "Gillespie County Plan and Standing Rules and Order for Procedures for Timely and Fair Appointment of Counsel for Indigent Accused Persons in Gillespie County, Texas." Since these written policies are not at issue in this action, this Court expresses no opinion of them.

Specifically, Rothgery alleges that Gillespie County follows a policy, practice, and custom that denies access to appointed counsel to a person charged with a felony, if that person is released from jail on bond, regardless of the person's financial status. Alternatively, Rothgery alleges that Gillespie County follows a policy, practice, and custom that denies access to appointed counsel to a person charged with a felony, but not yet indicted, if that person is out of custody on bond at the time of his request for counsel, regardless of the person's financial status. Rothgery further alleges that Gillespie County follows a policy, practice, and custom that involves failure to adequately train, supervise, and monitor county employees to whom the responsibility for preliminary processing of requests for appointed counsel has been delegated; thus creating an unreasonable risk that applications for appointed counsel will not be recorded and will not be ruled upon in a timely manner. Lastly, Rothgery alleges that Gillespie County follows a policy, practice, and custom that involves failure to adequately monitor appointed counsel, creating an unreasonable risk that attorneys appointed to represent indigent criminal defendants will not promptly contact those defendants, thereby denying meaningful access to counsel. Seeking monetary damages against Gillespie County, Rothgery claims these policies and customs injured him because, had be been timely appointed counsel in July 2002, the charges against him would have been resolved before he was indicted, rearrested, incarcerated, and subjected to increased bail in January 2003.

Gillespie County moves for summary judgment on Rothgery's entire action, arguing that there is no constitutional duty to appoint counsel prior to the initiation of adversary judicial proceedings. Gillespie County contends that the July 16, 2002 appearance before Judge Schoessow was not an adversary judicial proceeding because an appearance before a magistrate for statutory warnings does not involve counsel for the state and does not constitute a formal charge. Gillespie County argues that adversary judicial proceedings, sufficient to trigger Rothgery's Sixth Amendment right to counsel, were not initiated until after Rothgery was indicted and he made his first post-indictment court appearance. Thus, Gillespie County argues that the failure to appoint counsel for Rothgery from July 16, 2002, through January 23, 2003, did not violate Rothgery's Sixth Amendment right to counsel.

To the contrary, Rothgery argues that adversary proceedings were initiated against him on July 16, 2002, when he was charged by criminal complaint under Texas law. Rothgery contends that formal charges were filed against him under Texas law on July 16, 2002, when the arresting officer presented Judge Schoessow with the probable-cause affidavit. Gillespie County replies that no adversary judicial proceedings had begun on July 16, 2002, because the probable-cause affidavit is not a felony complaint under Texas law, and, even if it were, a felony complaint may be insufficient to trigger to the Sixth Amendment right to appointed counsel.

As discussed fully below, this Court concludes that neither the presentation of the probable-cause affidavit to Judge Schoessow nor Rothgery's appearance before Judge Schoessow on July 16, 2002, initiated adversary judicial proceedings against Rothgery. Thus, Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002, and Gillespie County did not violate Rothgery's Sixth and Fourteenth Amendment rights by failing to appoint counsel from July 16, 2002, through January 23, 2003.[7]

II. Summary-Judgment Standard

Summary judgment should be granted if the record, taken as a whole, "together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *New York Life Ins. Co. v. Travelers Ins. Co.*,

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[7] Gillespie County also moves for summary judgment on the grounds that it has no duty to appoint counsel or to establish plans or procedures for appointing counsel. Because the resolution of the Sixth Amendment issue is determinative of the entire action, this Court need not address Gillespie County's other grounds for summary judgment. Likewise, because the Court determines that Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002, the Court need not address Rothgery's allegations in his complaint that Gillespie County follows a policy, practice, and custom that involves failure to adequately train, supervise, and monitor county employees to whom the responsibility for preliminary processing of requests for appointed counsel has been delegated and failure to adequately monitor appointed counsel.

92 F.3d 336, 338 (5th Cir.1996). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A party moving for summary judgment "must 'demonstrate the absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case." *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir.1994) (*en banc*) (quoting *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548). If the moving party "fails to meet this initial burden, the motion must be denied, regardless of the nonmovant's response." *Little,* 37 F.3d at 1075.

If the moving party meets this burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *See Wallace v. Texas Tech Univ.,* 80 F.3d 1042, 1047 (5th Cir.1996). The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *See Wallace,* 80 F.3d at 1047; *Little,* 37 F.3d at 1075. Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual

controversy, that is, when both parties have submitted evidence of contradictory facts." *Little,* 37 F.3d at 1075. The court will not, "in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." *Little,* 37 F.3d at 1075.

In order to determine whether or not summary judgment should be granted, an examination of the substantive law is essential. Substantive law will identify which facts are material in that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-51, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

III. Analysis

In pertinent part, the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The purpose of the Sixth Amendment is to protect "the unaided layman at critical confrontations with his adversary." *U.S. v. Gouveia,* 467 U.S. 180, 189, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). The Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. *See Gouveia,* 467 U.S. at 187, 104 S.Ct. 2292; *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). The initiation of adversary judicial criminal proceedings may be by

way of formal charge, preliminary hearing, indictment, information, or arraignment. *See Kirby,* 406 U.S. at 689, 92 S.Ct. 1877. Federal courts look to state law in evaluating whether adversary judicial proceedings have been initiated. *See Moore v. Illinois,* 434 U.S. 220, 228, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977).

The Texas Court of Criminal Appeals has not set forth a "bright-line rule" to determine when adversary judicial proceedings begin. *See Hidalgo v. State,* 983 S.W.2d 746, 752 (Tex.Crim.App.1999). In fact, the "caselaw is somewhat indeterminate on the question of what events may serve to initiate adversary judicial proceedings for Sixth Amendment purposes." *Green v. State,* 872 S.W.2d 717, 720 (Tex.Crim.App.1994). Rather than following a bright-line rule as to when adversary judicial proceedings have begun, Texas courts focus on whether a particular event is a critical stage to which a person's Sixth Amendment right to counsel attaches. *See Hidalgo,* 983 S.W.2d at 752. Generally, Texas courts consider whether "the accused requires aid in coping with legal problems or assistance in meeting his adversary" in determining if an event is a critical stage. *Id.* Although this Court is bound by Texas courts' interpretation of the law governing its proceedings, this Court is not bound by the opinions of Texas courts concerning what constitutes a critical stage of prosecution under the Sixth Amendment. *See Coleman v. Alabama,* 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387

(1970) (rejecting Alabama Court of Appeal's conclusion that preliminary hearing was not critical stage).

The first issue before the Court is whether formal charges were filed against Rothgery on July 16, 2002, that initiated adversary judicial proceedings against him under *Kirby*. Rothgery contends that formal charges were filed against him when the arresting officer presented his Affidavit of Probable Cause to Judge Schoessow.[8] Rothgery argues that the probable-cause affidavit is a complaint under Texas law that initiated adversary judicial proceedings against him.

To support his contention, Rothgery relies on Article 15.04 of the Texas Code of Criminal Procedure, which states that "the affidavit made before the magistrate or district or county attorney is called a 'complaint' if it charges the commission of an offense." TEX. CODE CRIM. PROC. ANN. art. 15.04 (West 2005). Article 15.04 is found in the chapter of the Texas Code of Criminal Procedure titled "Arrest Under Warrant." *See* TEX. CODE CRIM. PROC. Arts. 15.01-15.27 (West 2005 & West Supp.2005). It is undisputed, however, that Rothgery was arrested without a warrant on July 15, 2002.[9] Although there

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[8] It is undisputed that Rothgery had not yet been indicted or charged by information on July 16, 2002. Further, no party suggests that Rothgery was presented for arraignment before Judge Schoessow on July 16, 2002.

[9] Chapter 14 of the Texas Code of Criminal Procedure, titled "Arrest Without Warrant," governs warrantless arrests. *See*

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is little case law on the issue, it appears that Texas courts have construed Article 15.04 as applying only to affidavits made in support of arrest warrants. For instance, in *Huynh v. State,* 901 S.W.2d 480, 481 n. 3 (Tex.Crim.App.1995), the court explained that "[a] complaint is a sworn affidavit charging the commission of an offense and serves as the basis for an arrest warrant." Judge Meyers noted in his concurrence in *Green* that

> [i]t is well to remember in this context that the word "complaint" has come to mean at least two different things under Texas law. First, it describes a sworn affidavit upon the basis of which a magistrate may issue a warrant of arrest. Tex.Code Crim. Proc. Ann. arts. 15.03(a)2, 15.04, 15.05. In this sense, it does not refer to a criminal pleading. *Wooldridge v. State,* 653 S.W.2d 811, 814 n. 6 (Tex.Crim.App.1983).

Green, 872 S.W.2d at 731 n. 5 (Meyers, J., concurring). Likewise, one Texas court has explained that an "affidavit supporting an arrest warrant is called a complaint." *Weems v. State,* 167 S.W.3d 350, 355 (Tex.App.-Houston [14th Dist.] 2005, pet ref'd.). Echoing Judge Meyers's statement in his *Green* concurrence, the same court has explained that "[t]he Code of Criminal Procedure uses the term 'complaint' to refer to both the affidavit supporting

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TEX. CODE CRIM. PROC. ANN. arts. 14.01-14.06 (West 2005 & West. Supp.2005).

an application for an arrest warrant and the written document alleging an offense that it sworn to before a prosecutor." *Merritt v. State,* 76 S.W.3d 632, 633 n. 1 (Tex.App.-Houston [14th Dist.] 2002, no pet.) citing TEX. CODE CRIM. PROC. ANN. arts 2.04, 15.04 (West 2005).

No court, however, has expressly held that Article 15.04 applies only to affidavits given in support of arrest warrants. At the same time, the Court has found no case holding, or even discussing the possibility, that Article 15.04 applies to affidavits given in support of a probable-cause determination following a warrantless arrest. Rothgery relies on *Nehman v. State,* 721 S.W.2d 319 (Tex.Crim.App.1986) in support of his argument that formal charges were filed against him on July 16, 2002. The *Nehman* court concluded that adversary judicial proceedings had been initiated by the time the accused's Article 15.17 warnings[10] were given and held the accused's confession inadmissible. *See id.* at 322-23. The *Nehman* court stated that "formal judicial proceedings had been initiated by the time of appellant's Art. 15.17 'warning hearing.'" *Id.* at 323 n. 2. Although the *Nehman* court did not elaborate further on how the "formal judicial proceedings" had been initiated, the opinion reflects that a warrant for appellant's arrest had been issued and that appellant had been advised of his rights under *Miranda v. Arizona,*[11] including his

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[10] *See supra* note 2.

[11] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

right to counsel, before the Article 15.17 warnings were given. *See id.* at 320. Because Rothgery was not arrested pursuant to a warrant, the Court finds *Nehman* distinguishable. The Court concludes that Article 15.04 is inapplicable to the facts of this case.

Additionally, the Texas Court of Criminal Appeals has observed that Texas law requires prompt probable-cause determinations for individuals arrested without a warrant to satisfy the Fourth Amendment. *See Green,* 872 S.W.2d at 721. Specifically, the *Green* court explained that "[b]ecause appellant was arrested without a warrant, it was necessary under the Fourth Amendment for the State promptly to obtain a probable cause determination 'as a condition of any significant pretrial restraint of liberty.'" *Id.* citing *Gerstein v. Pugh,* 420 U.S. 103, 125, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). It thus appears to this Court that, under Texas law, the purpose of presenting the probable-cause affidavit to Judge Schoessow on July 16, 2002, was to establish that probable cause existed under the Fourth Amendment for arresting Rothgery without a warrant, not to formally charge him with an offense under Texas law or *Kirby.*

Following Texas jurisprudence, the Court concludes that Article 15.04 does not apply to the probable-cause affidavit presented to Judge Schoessow in support of Rothgery's warrantless arrest. The Court further concludes that the probable-cause affidavit presented to Judge Schoessow on July 16, 2002, is not a complaint under Texas law formally charging

Rothgery with an offense under *Kirby*. Since no formal charges were filed against Rothgery on July 16, 2002, adversary judicial proceedings were not initiated against him at that time, and his Sixth Amendment right to counsel did not attach.

In light of this Court's determination that no formal charges had been filed against Rothgery with the presentation of the probable-cause affidavit to Judge Schoessow, the Court agrees with Gillespie County that Rothgery's appearance before Judge Schoessow on July 16, 2002, did not initiate adversary judicial proceedings under Texas law. On July 16, 2002, pursuant to Article 15.17(a), Judge Schoessow advised Rothgery of his rights, informed him of the crime accused, advised him of the right and procedures for obtaining counsel, determined probable existed for his detention and set bond. *See* TEX CODE CRIM. PROC. ANN. art. 15.17(a). The Texas Court of Criminal Appeals has held that the giving of Article 15.17 warnings does not initiate adversary judicial proceedings. *Wyatt v. State,* 566 S.W.2d 597, 600 (Tex.Crim.App.1978). The *Wyatt* court stated that "[i]t is clear that the form signed and relied upon by appellant is simply an acknowledgment that a magistrate's warning was given pursuant to Article 15.17. . . . We cannot conclude that informing the defendant of the accusation against him constitutes the initiation of adversary criminal procedures." *Id.* Further, the *Green* court observed that "[o]ther than its Article 15.17 aspect, the PIA [preliminary initial appearance], *per se,* is not a requirement of state

law." *Green,* 872 S.W.2d at 722. The *Green* court explained that nothing that occurred at the defendant's preliminary initial appearance "required the aid of counsel to cope with any legal problem or assist in meeting the prosecutorial adversary." *Id.* at 721.[12] Additionally, the *Green* court stated, in *dicta,* that the possibility that an attorney could contest bail "does not convert the PIA [preliminary initial appearance] into a critical stage." *Green,* 872 S.W.2d at 722. Although not bound by the state court's critical-stage determination, the Court is persuaded that the determination is reflective of the Texas Court of Criminal Appeals' view that adversary judicial proceedings are not initiated by an appearance before a magistrate for Article 15.17 warnings and the setting of bail.

The Court concludes that no adversary judicial proceedings were initiated against Rothgery under Texas law on July 16, 2002, when Rothgery appeared before Judge Schoessow. Gillespie County is correct

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[12] In *Green,* the defendant was arrested without a warrant, charged by felony complaint the day after his arrest, and subsequently presented to a magistrate pursuant to Article 15.17. Despite the State's invitation, the Texas Court of Criminal Appeals declined to hold that adversary judicial proceedings can only be initiated in a felony prosecution by the filing of an indictment. *See Green,* 872 S.W.2d at 720. Rather, the court held that an appearance before a magistrate under Article 15.17 and a probable-cause determination, following a warrantless arrest, is not a critical stage, even if adversary judicial proceedings have been initiated. *See id.*

that Rothgery's Sixth Amendment right to counsel did not attach at that time.

This Court's holding that neither the presentation of the probable-cause affidavit to Judge Schoessow or Rothgery's appearance before Judge Schoessow on July 16, 2002 initiated adversary judicial proceedings against Rothgery under Texas law is consistent with Supreme Court and Fifth Circuit precedent. The Supreme Court has repeatedly stated that "the initiation of judicial criminal proceedings is far from a mere formalism." *Kirby,* 406 U.S. at 689, 92 S.Ct. 1877. Rather, the initiation of judicial criminal proceedings

> is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90, 92 S.Ct. 1877.

Although the Supreme Court has extended the Sixth Amendment's right to counsel to certain "critical stages" of criminal proceedings, it has done so in limited circumstances. *See Gouveia,* 467 U.S. at 189,

104 S.Ct. 2292. In the narrow instances where the Supreme Court has recognized that an accused Sixth's Amendment right attaches at a pretrial proceeding,

> the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, *United States v. Ash, supra,* 413 U.S. at 310, 93 S.Ct. at 2574, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade,* supra, 388 U.S. at 224, 87 S.Ct. at 1930.

Gouveia, 467 U.S. at 188-89, 104 S.Ct. 2292. Accordingly, the Sixth Amendment right to counsel can attach at pre-indictment preliminary hearings, if an accused is confronted with prosecutorial forces and witnesses against him. *See Coleman,* 399 U.S. at 10, 90 S.Ct. 1999. In such instances, "the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution." *Id.* at 9, 90 S.Ct. 1999.

The Fifth Circuit has held that an adversary criminal proceeding has not begun where the prosecution officers are unaware of either the charges or the arrest. *See McGee v. Estelle,* 625 F.2d 1206, 1208 (5th Cir.1980). The Fifth Circuit reasoned that an appearance before a magistrate for statutory warnings does not trigger the adversary process under Texas law because it does not involve counsel for the state and is not a formal charging. *See id.* at 1209.

Rather, such an appearance "is for the purpose of complying with the requirements set forth in *Miranda v. Arizona*." *Id.*

The Court notes that the summary-judgment record does not reflect any involvement of the Gillespie County District Attorney's Office on July 16, 2002. There is no summary-judgment proof that a prosecutor from the Gillespie County District Attorney's Office was present at Rothgery's July 16, 2002, appearance before Judge Schoessow or involved in any way in the probable-cause determination. To the contrary, the summary-judgment proof demonstrates that no decision had been made by the Gillespie County District Attorney's Office on July 16, 2002, to prosecute Rothgery for the criminal offense of unlawfully carrying a firearm by a felon. As the warnings form that Judge Schoessow presented to Rothgery reflects, no charges had been filed against Rothgery at that time. Rather, the form reflects that charges "will be filed" in Gillespie County district court.

For this Court to find that Rothgery's Sixth Amendment right to counsel attached on July 16, 2002, the Court would have to conclude that a warrantless arrest plus Article 15.17 warnings and a subsequent probable-cause determination, without involvement by prosecutorial forces, is sufficient to trigger the Sixth Amendment right to counsel. Such a holding would violate Supreme Court precedent equating adversary judicial proceedings with criminal prosecutions, which necessarily implies involvement, or, at a minimum, awareness of the prosecutor. *See*

McNeil v. Wisconsin, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment") quoted in *Texas v. Cobb,* 532 U.S. 162, 167-68, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001); *Gouveia,* 467 U.S. at 188, 104 S.Ct. 2292 (Sixth Amendment requires existence of both criminal prosecution and accused). Further, such a holding would be dangerously close to violating the clear statement in *Gouveia* that the Sixth Amendment right to counsel does not attach at the time of arrest.[13] *See Gouveia,* 467 U.S. at 190, 104 S.Ct. 2292.

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[13] In explaining that the Sixth Amendment right to counsel does not attach at the time of arrest, then Justice Rehnquist differentiated between the Sixth Amendment rights to counsel and to speedy trial. Although the Sixth Amendment's speedy-trial guarantee may attach before an indictment, and as early as the time of arrest and holding to answer a criminal charge, the Supreme Court had never held that the Sixth Amendment's right to counsel attaches at the time of arrest.

This difference is readily explainable, given the fact that the speedy trial right and the right to counsel protect different interests. While the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor, the speedy trial right exists primarily to protect an individual's liberty interest, "to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *United States v. MacDonald, supra,* 456 U.S. at 8, 102 S.Ct. at 1502. *See Barker*

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Finally, such a holding would be inconsistent with Texas law regarding initiation of adversary judicial proceedings. *See Green* 872 S.W.2d at 720; *Nehman,* 721 S.W.2d at 323; *Wyatt,* 566 S.W.2d at 600.

In conclusion, the Court finds that no adversary judicial proceedings were initiated on July 16, 2002, under Texas law, either by way of the presentation of the probable cause affidavit to Judge Schoessow or by Rothgery's appearance before Judge Schoessow. Thus, Rothgery's Sixth Amendment right to counsel did not attach on July 16, 2002. The Court concludes that Gillespie County did not violate Rothgery's Sixth Amendment rights by failing to appoint Rothgery counsel from July 16, 2002 until January 23, 2003.[14]

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v. Wingo, 407 U.S. 514, 532-533, 92 S.Ct. 2182, 2192-2193, 33 L.Ed.2d 101 (1972); *United States v. Marion, supra,* 404 U.S. at 320, 92 S.Ct. at 463.

Gouveia, 467 U.S. at 190, 104 S.Ct. 2292.

The distinction between the right to counsel and right to speedy trial further persuades the Court that the July 16, 2002 appearance did not initiate adversary judicial proceedings against Rothgery, as Rothgery was not held "to answer a criminal charge," but, instead, was only informed of the accusation against him.

[14] The Court recognizes that Rothgery testified in his deposition that he requested counsel on January 19, 2003, and that no counsel was appointed based on this request. As previously noted, this request is not included in the summary-judgment proof. Only the January 23, 2003 request, upon which Judge Ables acted immediately is before the Court. Construing, as the Court must, all facts in favor of Rothgery, the Court presumes Rothgery did request counsel on January 19, 2003.

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Turning to Rothgery's Fourteenth Amendment allegations, Rothgery alleges that Gillespie County violated his right to due process and to equal protection under the law by denying him access to counsel, in part, by delaying appointment of counsel for six months. The Sixth Amendment's right to counsel applies to the states through the Fourteenth Amendment. *See Gideon v. Wainwright,* 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). A person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. *See Kirby* 406 U.S. at 688, 92 S.Ct. 1877. Because this Court has determined that no adversary judicial proceedings were initiated against Rothgery on July 16, 2002, and that his right to counsel under the Sixth Amendment did not attach at that time, Gillespie County did not unconstitutionally deny Rothgery access to counsel. Thus, there is no violation of the Fourteenth Amendment under either the due process or equal protection clauses.

Gillespie County's failure to appoint counsel on January 19, 2003, is, at best, negligence, and not indicative of a policy, practice, or custom to avoid appointing counsel. As soon as Judge Ables was advised of Rothgery's January 23, 2003 request, Judge Ables appointed counsel.

IV. Conclusion

IT IS THEREFORE ORDERED that Defendant Gillespie County's Motion for Summary Judgment (Doc. # 28) is **GRANTED**.

APPENDIX C

Warning by Magistrate (Setting Bail & Right to Attorney) State of Texas, County of Gillespie

This is to certify that I, acting as and in the capacity of a magistrate, in clear language, and in person, did inform:

Name: Walter Allen Rothgery Case Number: _____

1. You are accused of the criminal offense of: unlawful possession of a firearm by a felon which ~~is~~/will be filed in 216th District Court, Gillespie Court.

2. If peace officers or attorneys representing the state question you, you have the right to have a lawyer present. You have the right to talk to your lawyer *before* being questioned, to have your lawyer with you *while* being questioned and the right to *stop the questioning* at any time. If you cannot afford to hire a lawyer, you have the right to have one appointed.

3. You have the right to remain silent and are not required to make a statement, either oral or written. Any statement you make can be used as evidence against you in court.

4. In felony cases, you have the right to an examining trial.

YOUR BOND IS SET AT: 5,000.00 (Cash/Surety)/ ~~(Personal Bond)~~/(Bond ~~Not Determined~~)

I have further (in clear language understood by the accused) informed the accused:

1. If you cannot pay for a lawyer, you can request one *right now*.

2. You would have to fill out a sworn statement about your work, what you own, your expenses and family.

3. If you need help filling out the form, someone will help you.

4. These are the time frames. Your request will be sent to the judge of your case within 24 hours. He/she has 3 days to decide if you get a court appointed lawyer. If a lawyer is appointed, s/he will try to contact you by the end of the next first working day.

I, the magistrate in this case, hereby certify that:

1. The law enforcement agency having custody of the named accused has brought the accused before this magistrate not later than 48 hours after arrest.

2. I have informed the accused of his/her right to request appointment of an attorney, if indigent, and the procedures for requesting appointment of an attorney.

3. If the accused does not speak and/or understand the English language or is deaf, I have informed the accused in a manner consistent with the Tx CCP Art. 38.30 and 38.31.

4. I have ensured that all reasonable assistance in completing the necessary forms for the requesting appointment of an attorney has been provided.

5. A record of the magistrate's advising the accused of the right to appointed attorney has been prepared in accordance with the law and such record consists of this document signed by me as Magistrate, a copy of which was provided to the accused person.

I, the magistrate in this case, do certify that I am the duly elected or appointed Justice of the Peace, ___ Precinct #1/ ✓ Precinct #2/ ___ Fredericksburg Municipal Judge in Gillespie County, Texas and further certify that:

(✓) The accused has announced the intention to *waive right to counsel* at this time WR (initials)

( ) The accused has announced s/he is *not indigent* and does not wish appointment of attorney at this time. _____ (initials)

( ) The accused is being held on a *misdemeanor* accusation and has claimed s/he is indigent and has requested court appointed counsel. The Affidavit of Indigence and Request for Attorney is to be referred within 24 hours to: the Gillespie County Judge for determination of indigence and if appropriate, appointment of attorney in accordance with the plan approved by the District Judge of Gillespie County, TX/ _____.

( ) The accused is being held on a *felony* accusation and has claimed s/he is indigent and has requested court appointed counsel. The Affidavit of Indigence and Request for Attorney is to be referred within 24 hours to: the District Judge of Gillespie County, TX for determination of indigence and, if appropriate, appointment of attorney in accordance with the plan approved by the District Judge of Gillespie County, TX/ _____.

x /s/ Walter Rothgery
PERSON WARNED

/s/ Carl E. Schoessow
Magistrate, Gillespie County, Texas

Date and Time: July 16, 2002 at 8:30 AM

Witness: /s/ Ray Rodriguez